district court, not the petit jury, denied Verbitskaya's motion for a downward departure. Accordingly, on April 9, 2003, the district court sentenced Verbitskaya to 108 months in prison and Verbitsky to 120 months in prison. The petitioners were also ordered to serve 3 years of supervised release and to pay $24,123.22 in restitution. (*Ibid.*)

Although, as noted above, petitioners objected to the district court's guideline calculations in determining their sentences, petitioners – mindful that the Eleventh Circuit's *en banc* decision in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (*en banc*), as well as decisions from every other circuit, continued to preclude any application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to the Guidelines – did not cite *Apprendi* as a basis for any of their objections. Nor, of course, did they cite *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531 (2004), or *United States v.Booker*, 125 S.Ct. 738 (2005), as neither of these decisions had yet been rendered.

On appeal, petitioners filed their initial briefs on January 12, 2004, and their reply briefs on April 1, 2004. Verbitsky's initial brief specifically challenged the guideline calculations for his sentence, and Verbiskaya's initial brief adopted that argument. Prior to oral argument, on December 7, 2004, Verbitsky submitted supplemental authority, pursuant to Fed.R.App.P 28(j), raising this Court's decision in *Blakely* and separately moving to allow supplemental briefing on the impact of *Blakely*. (App. C.) In this motion, Verbitsky specially argued that "the *Blakely* decision has [a] direct effect on Appellant's case." (App. C.) The government moved to strike the notice based on the Eleventh Circuit's practice (employed only since 2000) of finding all claims "waived" that are not raised in an appellant's initial brief and opposed the motion for supplemental briefing. In separate orders issued on September 7 and October 8, 2004, respectively, the Eleventh Circuit granted the government's motion to strike Verbitsky's Rule 28(j) notice of supplemental authority and denied Verbitsky's motion to permit the filing of supplemental briefs on the potential impact of *Blakely* . (App. D, E.)

Oral argument occurred on December 7, 2004. Approximately five weeks later, on January 12, 2005, this Court issued its decision in *Booker*. Shortly thereafter, Verbitsky submitted *Booker* to the Eleventh Circuit as supplemental authority under Rule 28(j).

On April 21, 2005, the Eleventh Circuit issued a published decision, affirming petitioners' convictions and sentences. (App A). The Eleventh Circuit expressly "declined to address" petitioners' sentencing issues, even under a "plain error" standard, "reiterat[ing]" its practice of imposing "waiver" on all claims not raised in the intial briefs filed by petitioners, regardless of any intervening decisions issued from this Court thereafter. *See United States v. Verbitskaya*, 406 F.3d 1324, 1339 (11th Cir. 2005), citing *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), and *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2005).

On June 9, 2005, Verbitsky timely filed a *pro se* petition for rehearing *en banc*, arguing that the Eleventh Circuit's decision was "in clear conflict" with both *Blakely* and *Booker*. His petition expressly criticized the *Nealy* rule, arguing that *Nealy* "ignores the Supreme Court's decision in Booker, which was decided well in advance of the panel's decision in this present matter" and constituted "an aggregious [sic] breach of form ... [over] substance...." On August 8, 2005, Verbitsky's petition for rehearing was summarily denied. (App. B.) Hence, petitioners have, to this date, not yet obtained any judicial review of their *Booker* claims on the merits. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

BOOKER'S SPECIFIC DIRECTIVE THAT BOTH ITS HOLDINGS "MUST" BE "APP[LIED] TO...ALL CASES ON DIRECT REVIEW," SUBJECT ONLY TO "ORDINARY PRUDENTIAL DOCTRINES" AS TO REVERSIBILITY, REQUIRES THIS COURT TO ISSUE A GVR, PREFERABLY WITH EXPLICIT INSTRUCTIONS TO THE ELEVENTH CIRCUIT TO DETERMINE WHETHER PETITIONERS' SENTENCES MEET THE "PLAIN-ERROR" TEST FOR REVERSAL UNDER *BOOKER*.

The dual holdings in *United States v. Booker*, 543 U.S. at ___, 125 S.Ct. 738 (2005), have become well known: one holding, expressed in the majority opinion led by Justice Stevens, declared that the Federal Sentencing Guidelines violate the Sixth Amendment in so far as they operate as a mandatory scheme under which judges, not juries, find facts that enhance sentences, *id.* at 746-757; the other holding, announced in a different majority opinion led by of Justice Breyer, decided that the remedy for the Sixth Amendment violation was to transform what had been a mandatory scheme into an advisory one, *id.* at 757-768. As a result of these two holdings, there are two types of errors under *Booker*: constitutional error – which occurs when a judge imposes a sentence enhancement beyond that authorized by the jury's verdict; and statutory error – which occurs when a judge treats the Guidelines as binding, rather than advisory. There is no question that both types of *Booker* error occurred here.

The district court, not the petit jury, found –using a diluted burden of proof – that the proper guideline for calculating petitioners' base offense levels was the "extortion" guideline, U.S.S.G. § 2B3.2(a), and not the "blackmail" guideline, U.S.S.G. § 2B3.3, thereby effectively doubling the petitioners' base offense level – from level 9 to level 18. The district court, not the petit jury, also found that the extortion exceeded $250,000, thereby increasing petitioners' guideline score by an additional 3 levels. The district court, not the petit jury, then found that Verbitksy used a firearm during the commission of the offense, increasing his sentence an additional 6 levels. And, the district court, not the petit jury, found that Verbitskaya was not entitled to a downward departure. By basing

petitioners' sentences on its own findings, the district court applied to petitioners precisely the type of extra-verdict enhancements forbidden by *Booker's* constitutional rule. In addition, the district court, applying the Guidelines as they existed before *Booker* was decided, naturally treated the Guidelines scheme as binding. In so doing, the district court also committed a *Booker* statutory error.

Nor is there any question that both holdings in *Booker* "***apply***...to all cases on direct review" -- although, as will be discussed further in §II below, the separate issue of whether a case to which *Booker* applies should then be ***reversed*** because of *Booker*-error depends upon the application of "ordinary prudential doctrines" as to reversibility, such as the "plain-error" test. *See* 125 S. Ct. at 769 (emphasis added). Indeed, this Court's statement as to the ***applicability*** of *Booker* to not-yet-final cases at the conclusion of Justice Breyer's opinion is clear and straightforward:

> [W]e ***must apply*** today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – ***to all cases on direct review***. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)...("[A] new rule for the conduct of criminal prosecutions ***is to be applied*** retroactively ***to all cases***...pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").... [However,] we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test.

125 S.Ct at 769 (emphasis added).

Here, of course, petitioners' cases were "pending on direct review [and] not yet final" when the decision in *Booker* was rendered on January 12, 2005 – and they were still in that not-yet-final status when Verbisky presented the Eleventh Circuit specifically with his

Booker challenge by filing his notice of supplementary authority,[1] and when he more fully argued that challenge in his petition for rehearing filed on June 8, 2005. Furthermore, since a case is "final" only when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied," *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987), petitioners' cases ***are still not yet final***. Accordingly – putting aside for the moment the effect of the Eleventh Circuit's practice of using its initial-brief rule as a procedural bar, which will be discussed in §II below – there should be no dispute that the dual *Booker*-holdings ***apply to this case***.

However, the question remains whether petitioners' sentences should be ***reversed*** under either or both of the *Booker* holdings. Petitioners recognize that because they lodged no objection in the district court to either of the *Booker* errors they have since raised – an "understandable" omission, given the state of federal law at the time[2] – the question whether their sentences should be ***reversed*** under *Booker* will naturally be subject to review under the "plain-error" test.

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[1] Verbitsky had previously raised the applicability of *Blakely* to his case. (App. C.)

[2] As the Eleventh Circuit itself recognized in its recent decision in *United States v. Vanorden*, 414 F.3d 1321, 1323, n.1 (2005):

> [Such an] omission is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in *Apprendi*, "ha[d] no application to, or effect on,...Sentencing Guidelines calculations, when...the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty," *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir.2001) (*en banc*).

See Fed. R. Crim. P. 52(b) (authorizing review of errors "not brought to the court's attention").

That question – whether petitioners' sentences meet the "plain-error" test, thereby warranting reversal – should, of course, be answered in the first instance by the court of appeals, ***not*** by this Court. *See, Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (remand orders "assist[] this Court by procuring the benefit of the lower court's insight before we rule on the merits"); *Stutson v. United States*, 516 U.S. 193, 197 (1996) (remand orders also "respect the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it"). *See also Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964) (remand is appropriate when Court is "not certain that...case was free from all obstacles to reversal on an intervening precedent" but the intervening decision is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case").

So that petitioners may obtain an answer to the "plain-error" question from the Eleventh Circuit, petitioners request that this Court issue a "GVR" order – an order granting their petition for a writ of certiorari, vacating their judgments, and remanding their cases for further consideration under *Booker* – as it has done in hundreds of similar cases. However, petitioners request an important addition to the standard GVR that has been issued in those other, similar cases. Petitioners request that the GVR order issued in this case preferably include ***explicit instructions to the Eleventh Circuit to determine whether Silvestri's sentence meets the "plain-error" test for reversal under Booker***.

This additional request is made because, as this Court should be aware, without that instruction, the Eleventh Circuit will likely refuse to make such a determination on a GVR which merely directs "further consideration in light of *Booker*" – as it has done in so many cases where, as here, the *Booker* claim was not raised in appellant's initial brief on appeal. *See, e.g., United States v. Gray*, 2005 WL 2237698 (11th Cir., Sept. 15, 2005) (unpub.) (barring *Booker* claim on

remand pursuant to GVR for "consideration in light of *Booker*" on basis of initial-brief rule); *United States v. Dixon*, 142 Fed. Appx. 402 (11th Cir., July 27, 2005) (unpub.) (same); *United States v. Smith*, 416 F.3d 1350 (11th Cir. 2005) (same); *United States v. Cesal*, 2005 WL 1635303 (11th Cir., July 13, 2005) (unpub.) (same); *United States v. Levy*, 416 F.3d 1273 (11th Cir. 2005) (same); *United States v. Vanorden*, 414 F.3d 1321 (11th Cir. 2005) (same); and *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) (same).

If the additional instruction – specifically, to determine whether petitioners' sentences meet the "plain-error" test – is given, the Eleventh Circuit will be required to adhere to the Court's specific directive that *Booker* "must" be "appl[ied]...to all cases on direct review," subject only to "ordinary prudential doctrines" as to reversibility, such as the "plain-error" test. Accordingly, with such an instruction, petitioners will receive the benefit of equal treatment envisioned by this Court in *Griffith*, when it said:

> selective application of new rules violates the principle of treating similarly situated defendants the same....[T]he problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule.

479 U.S. at 322 (citations omitted; *italics* in original).

II.

THIS COURT SHOULD STRIKE DOWN THE ELEVENTH CIRCUIT'S "STRANGE, BAD RULE," WHICH TREATS THE FAILURE TO RAISE A THEN-UNKNOWN *BOOKER* CLAIM IN APPELLANT'S INITIAL BRIEF AS A "WAIVER," THEREBY CATEGORICALLY BARRING CONSIDERATION OF THAT CLAIM, AS THAT RULE – EMPLOYED BY NO OTHER CIRCUIT – FLOUTS THE COURT'S SPECIFIC DIRECTIVE THAT *BOOKER* "MUST" BE "APPL[IED]...TO ALL CASES ON DIRECT REVIEW," SUBJECT ONLY TO "ORDINARY PRUDENTIAL DOCTRINES" AS TO REVERSIBILITY.

In ruling that petitioners "waived" their argument that their cases should be remanded for re-sentencing under *Booker* by not asserting it in their initial appellate briefs, and are, thereby, categorically barred from raising such arguments on appeal, *Verbitskaya*, 406 F.3d at 1339, the Eleventh Circuit applied what Circuit Judge Tjoflat, specially concurring in *Vanorden*, 414 F.3d at 1324, characterized as a "***strange, bad rule***" – "***a strange rule***" in that it results in the Eleventh Circuit concluding that the issuance by this Court of a GVR-"for further consideration in light of *Booker*" does not actually require any consideration of the merits of an appellant's Booker claim, and "***a very bad rule***" because it is "an absolute, across-the-board bar," *id.* at 1328, "inconsistent with Supreme Court precedent and the law of every other circuit," which "encourages...frivolous claims," *id.* at 1324. As Judge Tjoflat spelled out in greater detail in an earlier opinion dissenting from the denial of rehearing *en banc* in *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) – a case which, like *Vanorden*, held the failure to include a then-unknown Sixth Amendment-sentencing claim in an initial brief to constitute a procedural bar – the Eleventh Circuit's practice of applying its initial-brief rule to *Booker* claims suffers from at least four significant infirmities:

> **First**, it unjustifiably limits the principle of *Griffith v. Kentucky*, 479 U.S.314,...(1987), that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases...pending on direct review or not yet final." *Id.* at 328 (emphasis added). **Second**,

> by erroneously terming [appellant's] failure to raise a [*Booker*]-type claim in his opening brief a "waiver" rather than a mere "forfeiture," the decision unduly limits our scope of review under Federal Rule of Criminal Procedure 52(b), as interpreted by the Supreme Court in *United States v. Olano*, 507 U.S. 725,...(1993). **Third**, it continues a circuit split that finds this court standing alone. **Fourth**, it sends a clear message to appellate counsel that they should brief every colorable claim – even those claims that are squarely foreclosed by our own precedent – or else risk costing their clients the benefit of a favorable intervening decision.

Levy, 391 F.3d at 1336-1337 (Tjoflat, dissenting, emphasis added). *See also id.* at 1351-1356 (Barkett, J., also dissenting in *Levy*, for same overall reasons); *United States v. Higdon*, 418 F.3d 1136 (11th Cir. 2005), *cert. granted*, 2005 WL 1219537 (Oct.3, 2005), *id.* at 1144-1145 (Tjoflat, J., again dissenting from denial of rehearing *en banc* where consideration of *Booker*-error was held procedurally barred by initial-brief rule); *id.* at 1151-1152 (Barkett, J., also again dissenting). A closer look at the four infirmities identified by Judge Tjoflat imparts an urgency to the "[h]ope[]" he expressed at the conclusion of his special concurrence in *Vanorden*, 414 F.3d at 1328-1329 – a hope that this Court will "soon correct this practice."

A. The Eleventh Circuit's anti-*Booker* practice not only conflicts with *Griffith*; it flouts *Booker's* specific directive.

This Court explained in *Griffith* that, to assure both due process and equal protection, an appellate court ***may not*** "disregard current law, when it adjudicates a case pending before it on direct review." 479 U.S. at 326; *see also* 479 U.S. at 322 ("failure to apply...newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication"); *id.* at 327 (noting "actual inequity" results where "only one of many similarly situated defendants receives the benefit of the new rule").

Significantly, *Griffith* did ***not*** limit the reach of its rule to cases on direct review where the claim at issue had already been raised; if the Court had intended such a limitation it could have said so. Rather, using the broadest language possible, *Griffith* stated that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to ***all cases***, state or federal, pending on direct review or not yet final." 479 U.S. at 326-328 (emphasis added). As Judge Tjoflat noted in his dissent in *Levy*:

> There is simply nothing in the opinion [in *Griffith*] to suggest that a defendant must raise the issue in his initial appellate brief in order to receive the benefit of retroactivity. To the contrary, it consistently refers to *all* cases or *all* convictions not yet final.

391 F.3d at 1339 (italics in *Levy*), citing *Griffith*, 479 U.S. at 323, 324, 328.

Moreover, there is nothing in *Griffith* or its progeny which suggests that any factor other than ***the date upon which a conviction becomes final*** will serve to qualify – or disqualify – a case for the retroactive application of a "new rule for the conduct of criminal prosecutions." As Judge Tjoflat explained in his *Levy* dissent:

> Applying [the *Griffith*] rule in criminal cases, the [Supreme] Court has ***never drawn distinctions among defendants on any basis other than the finality of their convictions***. In *Griffith*, for example, the Court discarded the "clear break" exception to retroactivity because it concluded that the fact that a decision is a clear break with precedent simply "has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule" or on the principle that a court must "not disregard current law[] when it adjudicates a case pending before it on direct review." *Id.* at 326-27 [citation omitted].

391 F.3d at 1338 (emphasis added).

That is not to say that *Griffith* holds that "all cases...pending on direct review or not yet final" when a new criminal-prosecution rule is announced must be ***reversed***. There is a critical distinction between ***applying*** a new rule to a not-yet-final case and deciding that, as a result of that application, the new rule requires ***reversal*** of that case. Indeed, *Booker* itself makes clear that while *Griffith* requires that new rules "be applied retroactively to all cases" that are not-yet-final, it does not eliminate the need to employ "ordinary" standards of appellate review to decide whether, in any given case, reversal is required. That is precisely the import of the passage in *Booker* immediately following the citation to *Griffith*, which states:

> That fact [*i.e.* that "we must apply" both *Booker* holdings "to all cases on direct review"] does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ***ordinary prudential doctrines***, determining, ***for example***, whether the issue was raised below and whether it fails the '***plain-error***' test." It is also because in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the ***harmless-error*** doctrine.

125 S.Ct. at 769 (emphasis added).

Plainly, in this passage, the Court was not talking about "doctrines" that would ***bar the applicability*** of *Booker's* two holdings; it was talking about "doctrines" -- such as ***plain error*** and ***harmless error*** – upon which ***reversibility*** will hinge once the *Booker* holdings are applied. The Eleventh Circuit's practice of implementing its initial-brief rule so as to ***categorically bar consideration*** of *Booker* claims not only subverts the meaning of the phrase "ordinary prudential doctrine" as used in *Booker*; it effectively eviscerates this Court's mandate in *Booker* that its dual holdings

"***must***" be "appl[ied]...to all cases on direct review," subject only to standards of reversibility.

Simply put, the Eleventh Circuit's practice of implementing its initial-brief rule as "an absolute, across-the-board bar" effectively flouts this Court's specific directive in *Booker*. As Judge Tjoflat has correctly perceived, the "upshot" is "that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review...***will not apply at all*** to cases on direct review like this one." *Vanorden*, 414 F.3d at 1328 (specially concurring) (emphasis added). To enforce its *Booker* directive, this Court should grant the petition for a writ of certiorari and strike down the Eleventh Circuit's "strange, bad rule."

B. The Eleventh Circuit misapplied the doctrine of "waiver" and in so doing, conflicts with other circuits.

By tagging petitioners' submissions with the label "waiver," the Eleventh Circuit tried to chart an easy end-run around the "ordinary prudential doctrine" of plain error, codified in Rule 52(b).[3] For, as this Court has made clear, "waiver" ***will*** "extinguish an 'error' under Rule 52(b)." *United States v. Olano*, 507 U.S. 725, 733 (1993). Accordingly, ***if*** petitioners had "waived" their *Booker* claims, ***then***, and only then, they would not be able to benefit from Rule 52(b) – and the Eleventh Circuit's decision to ignore their *Booker* claims could stand.

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[3] In *United States v. Young*, 470 U.S. 1, 6-7 (1985), this Court noted that Rule 52(b) codified the plain-error standard laid down in *United States v. Atkinson*, 297 U.S. 157 (1936), which, in turn, held that "[i]n exceptional circumstances, ***especially in criminal cases***, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160 (emphasis added).

However, ***petitioners did not waive their Booker claims.*** To be sure, petitioners did not raise *Booker*, or its antecedents *Blakely* or *Apprendi*, either during their sentencing proceedings before the district court, or in their initial briefs on appeal – or in their reply briefs. But petitioners' failure to do so was ***not*** the product of "an intentional relinquishment or abandonment of a ***known*** right or privilege" – long the *sine qua non* of "waiver." *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). Indeed, petitioners could ***not*** have "intentionally...abandoned" their *Booker* rights because, at the relevant time, neither petitioners, nor their lawyers – nor anyone else – ***knew*** that such rights existed. Even the majority opinion in *Vanorden*, 414 F.3d at 1323, n.1, concedes as much, stating, as noted above, that:

> Th[e] omission [of a sentencing-challenge under *Apprendi/Blakely/ Booker* during that time frame] is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in *Apprendi*, "ha[d] no application to, or effect on,...Sentencing Guidelines calculations, when... the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty," *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir.2001) (*en banc*).

It was only when this Court decided *Blakely* that petitioners and their counsel (and everyone else) began to suspect that Sixth Amendment rights might exist for federal defendants in the context of the Federal Sentencing Guidelines. And it was only when this Court decided *Booker* that that suspicion ripened into ***knowledge***. Petitioners, whose cases were ***still on direct appeal*** at both those times, immediately brought, first *Blakely*, then *Booker*, to the attention of the court of appeals through notices of supplemental authority and a motion to permit supplemental briefing, followed by Verbitsky's timely petition for rehearing in which he argued, as he does here, that *Booker's* directive to apply its holdings "to all cases

on direct review," subject only to "ordinary prudential rules," applies to this case, notwithstanding the Eleventh Circuit's initial-brief rule.

At worst, the failure of petitioners' counsel to raise their *Booker* challenges earlier, before they knew of the existence of their *Booker* rights, could be construed as a "forfeiture," not as a "waiver." As explained in *Olano*:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."

507 U.S. at 732-34, *quoting Johnson v. Zerbst,* 304 U.S. at 464. This distinction is critically important because issues that have been "forfeited" can still be ***considered*** under the plain-error test of Rule 52(b), whereas issues that have been "waived" cannot. As *Olano*, 507 U.S. at 733 made clear: "Mere forfeiture, as opposed to waiver, does ***not*** extinguish an 'error' under 52(b)." (Emphasis added).

The Eleventh Circuit's tactic – to try to cabin petitioners' claims under the confines of "waiver" – conflicts not only with the facts of this case, which establish that they did ***not*** "intentional[ly] relinquish[ ] or abandon[ ]...a known right." It also conflicts with the approach taken by every other circuit. Indeed, as will be seen in §II below, courts in ***every other circuit*** have ***considered on the merits*** *Apprendi/Blakely/ Booker* claims which were ***not*** presented in the initial brief on appeal – claims which the Eleventh Circuit would have labeled "waived" and, on that ground, would have ***refused*** to consider. Moreover, in cases from four other circuits in which the issue of "waiver" was expressly addressed, the courts of appeals have all rejected the argument that *Booker* claims not raised in an initial-brief filed before *Booker's* issuance could or should be disregarded as "waived." In two of these cases – *United States v. McDaniel*, 398 F.3d 540, 546 (6th Cir.2005) and *United States v. Macedo*, 406 F.3d 778, 788 (7th Cir. 2005) – the courts held that the doctrine of "waiver" simply did not apply. In two other cases – *United States v. Vazquez-*

Rivera, 407 F.3d 476 (1st Cir. 2005), and *United States v. Washington*, 398 F.3d 306 (4th Cir. 2005) – the courts held that whereas in ***other*** situations claims not raised in an initial brief may be considered "waived," ***no*** "waiver" will be found where *Booker* claims are later raised, given the intervening "substantial change in the applicable law," 407 F.3d at 487-88, and given that "the [Supreme] Court specifically mandated that we '***must apply*** [*Booker*]...to all cases on direct review,'" 398 F3d at 312 n.7 (emphasis added).

The petition for a writ of certiorari should be granted to correct the Eleventh Circuit's misapplication of the doctrine of "waiver" and to resolve the circuit-split on this issue.

C. The Eleventh Circuit's anti-*Booker* practice conflicts with that of every other circuit.

In as lop-sided a circuit-split as is possible, "the eleven other federal circuits that have been presented with claims like [the one at issue in this case] have ***all*** considered the merits of those claims." *Higdon*, 418 F.3d at 1145 (Tjoflat, J., dissenting) (emphasis added); *see Levy*, 391 F.3d at 1347-48 (Tjoflat, J., dissenting). In short, the Eleventh Circuit's practice of implementing its initial-brief rule as "an absolute, across-the-board bar" to ***consideration*** of *Booker* claims which, although "understandably" omitted from the initial brief, are, because of that omission, forever "waived," thereby foreclosing even "plain-error" review, conflicts with the law in every other circuit, both pre-*Booker*[4] and post-*Booker*.[5] Indeed, no other circuit -- other

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[4] *See United States v. Byers*, 740 F.2d 1104, 1115 n. 11 (D.C. Cir. 1984) (Scalia, J.) (considering merits of constitutional claim raised for first time in rehearing petition where supervening decision elevated constitutional claim from "completely untenable to plausible"); *United States v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Griffith*, 385 F.3d 124, (continued...)

[4](...continued)
127 (2d Cir. 2004) (despite defendant's failure to raise *Blakely*-type claim in initial brief, case held for merits review pending *Booker* decision); *United States v. Moore*, 109 Fed. Appx. 503, 505 n. 2 (3d Cir. 2004) (unpub.) (noting *Blakely* claim first raised in supplemental brief would be reviewed for plain error but declining to permit filing such brief because plain error clearly could not be established); *United States v. Hammoud*, 381 F.3d 316, 345 & n. 14 (4th Cir. 2004) (*en banc*) (filing of supplemental brief on *Blakely* grounds permitted); *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (rejecting government's argument that defendant "waived" claim based on then-recent Supreme Court decision by failing to object at trial or advance claim in initial brief); *United States v. Schafer*, 384 F.3d 326, 330-31 (7th Cir. 2004) (allowing supplemental brief arguing *Blakely*; remanded for resentencing); *United States v. Poulack*, 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Castro*, 382 F.3d 927, 929 & n. 3 (9th Cir. 2004) (as court has "authority to identify and consider...sentencing issues *sua sponte*," "parties with pending cases [may] inform...court by letter at any time...when...potential *Blakely*...issue exists"); *United States v. Cernobyl*, 255 F.3d 1215 (10th Cir. 2001) (plain-error review of *Apprendi* claim first raised in supplemental brief).

[5] *See Vazquez*, 407 F.3d at 487-488, *supra* (1st Cir) (because of "exceptional circumstances" of new Supreme Court decisions, *Blakely/ Booker* issues first raised in supplemental briefing would be reviewed); *United States v. Jones*, 415 F.3d 256, 259-260 (2nd Cir.2005) (*Booker* claim raised in supplemental brief; remand to district court for review to aid in determination of *Booker*-"plain error"); *United States v. Davis*, 407 F.3d 162, 165-166 (3rd Cir. 2005) (*en banc*) (remanded to district court for resentencing under *Booker* at defendant's request, without regard to timing of request; "plain error" prejudice "presumed"); *Washington*, 398 F.3d at 312 n.7, *supra* (4th Cir.) (*Booker* claims not "waived" and must be reviewed for plain error although not raised in initial brief); *United States v. Taylor*, 409 F.3d 675, 677(5th Cir. 2005) (as long as *Booker* claim is
(continued...)

than the Eleventh Circuit standing completely alone – has flatly refused to provide at least a "plain-error" merits review of claims under *Booker* simply because those claims, unknown at the time, were not raised in the initial-brief on appeal. Petitioners request that the Court grant certiorari to resolve this circuit conflict by ruling that the Eleventh Circuit's anti-*Booker* practice must cease.

D. The Eleventh Circuit's anti-*Booker* practice is bad policy

In defending the Eleventh Circuit's denial of *en banc* review in *Higdon*, Judge Hull phrased the rule now facing appellate counsel in the Eleventh Circuit's as a simple one: "raise the issue in your initial brief or risk procedural default." *Higdon*, 418 F.3d at 1139. But the impact on the practice of law is not so simple in fact. The Eleventh Circuit's practice of implementing its initial brief rule as "an

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[5](...continued)
raised sometime "before the decision [is] issued on...direct appeal," court will review for plain error); *United States v. Sloane*, 411 F.3d 643, 650 (6th Cir. 2005) (court expressly embraced "flexible approach to allowing defendants to raise issues based on *Booker*, such as filing supplemental briefs and submitting additional authority by letter pursuant to [Fed. R. App. P.] 28(j)"); *Macedo*, 406 F.3d at 789, *supra* (7th Cir.) (no waiver of *Blakely/Booker* claim, even though not raised until petition for rehearing); *United States v. Oliver*, 397 F.3d 369. 376 (6th Cir. Feb. 2, 2005) (reversing on plain-error review of *Blakely/Booker* issue raised for first time in post-briefing supplemental authority letters); *United States v. Ameline*, 409 F.3d 1073, 1076-1077 (9th Cir. 2005) (*en banc*) (although *Booker* issues not included in appellant's opening brief, *en banc* court expressly concluded, " as did the three-judge panel, that it [was]...appropriate to permit [appellant] to raise those issues"; limited remand to district court to aid plain error review); *United States v. Clifton*, 406 F.3d 1173, 1175 n.1, 1181 (10th Cir. 2005) (appellant "properly raised...Sixth Amendment issues in...supplemental brief"; sentence vacated as plain error under *Booker*); *United States v. Smith*, 401 F.3d 497 (D.C. Cir. 2005) (sentence reviewed for plain error under *Booker*, *even* though defendant failed to raise issue until petition for rehearing).

absolute, across-the-board bar" to the consideration, even on plain-error review, of constitutional claims not raised in an initial brief – even when the omission is admittedly "understandable" – creates ethical and strategic dilemmas for appellate counsel.

On the one hand, must counsel at the outset of a criminal appeal now recite a laundry list of every potential criminal-defense claim the Supreme Court may act upon during the sometimes several-year period before the case will become "final" – including claims that seem untenable or, that, indeed, have been previously rejected by all federal circuits – in order to avoid the foreclosure of plain-error review if there is a later Supreme-Court surprise? Will doing so subject counsel to ethical criticism for raising frivolous arguments? Will doing so crowd the initial brief on appeal with so many "trees" that genuinely meritorious arguments will be lost in "the forest" or result in such truncation of argument (because of page limitations) that their merit cannot be adequately presented? *See* Richard C. Klugh, Jr., *Ethical and Strategic Dilemmas Posed by Federal Appellate Bars to Plain Error Consideration of Newly-Available Claims: The Rule 52(b) Response to a "Catch 22,"* The Record, Journal of the Appellate Practice Section of The Florida Bar, Vol. XIII, No. 3, at 4, *et seq.*

On the other hand, if counsel does not engage in such a laundry-list approach, will counsel be subject to ethical criticism for failing to provide zealous advocacy? or subject to professional criticism for providing ineffective assistance of counsel? or even subject to monetary penalty for committing malpractice?

These ethical and strategic dilemmas created by the Eleventh Circuit's approach cannot be considered good policy. As Judge Tjoflat noted in his *Levy* dissent, the Eleventh Circuit's rule "essentially tell[s] counsel that they ***should*** 'raise every colorable claim on appeal' and that if they are 'too highly selective about the issues to be argued on appeal' they may do great injury to their clients." 391 F.3d at 1350. The resulting effect will be to "make th[e] court's work more difficult and waste judicial resources, not to

mention counsel's own time" – an effect that will do real "harm to the fair and efficient administration of justice in this circuit." *Id.* For these policy reasons, too, this petition for a writ of certiorari should be granted.

CONCLUSION

For all the reasons presented in the foregoing petition, the Court should grant the requested writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus VIKA VERBITSKAYA, a.k.a. Victoria Verbitsky, a.k.a. Vika Rounick, a.k.a. Victoria Pakuk, ALEXANDER VERBITSKY, Defendants-Appellants.

No. 03-11870
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

406 F.3d 1324; 2005 U.S. App. LEXIS 6839; 18 Fla. L. Weekly Fed. C 463

April 21, 2005, Decided
April 21, 2005, Filed

PRIOR HISTORY: Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 01-00869-CR-JLK.

COUNSEL: For Verbitskaya, Vika, Appellant: Strafer, G. Richard, G. Richard Strafer, P.A., Miami, FL.

For Verbitskaya, Alexander, Appellant: Schad, Kevin Michael, Schad & Cook, Indian Springs, OH.

For United State of America, Appellee: Schultz, Anne R., Osborne, Susan Rhee, Salyer, Kathleen M., U.S. Attorney's Office, Miami, FL.

JUDGES: Before BIRCH, KRAVITCH and CUDAHY *, Circuit Judges.

* Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION BY: KRAVITCH

OPINION:
KRAVITCH, Circuit Judge:

Vika Verbitskaya and Alexander Verbitsky appeal their convictions and sentences for conspiracy to obstruct, delay and affect interstate and foreign commerce by extortion in violation of *18 U.S.C. § 1951(a)* ("The Hobbs Act") and for unlawfully obstructing, delaying and affecting interstate and foreign commerce by extortion in violation of *18 U.S.C. § 1951(a)&(b)(2)*.

I.

The relevant facts and procedural history are as follows. Stanislov Khazanov notified the Federal Bureau of Investigation ("FBI") in October of 2000 that he was being extorted by his former girlfriend Vika Verbitskaya. Khazanov, a Russian immigrant now living in Florida, had received a settlement of approximately $ 1,000,000 from two out-of-state insurance companies[1] following the tragic death of his wife Anna, who was killed in an automobile accident on November 15, 1999. After he paid lawyers' fees and set up a trust fund for his daughter, $ 250,000 remained. He used a portion of the settlement to incorporate Glamour International Productions.[2] Khazanov also possessed twenty-seven paintings that his mother had transported from Russia, which he intended to use to open an art gallery where he would sell Russian artwork.

Verbitskaya had lived with Khazanov from May or June of 2000 through September of 2000, when the relationship ended. During that

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[1] One was New Hampshire Insurance Company, headquartered in New Hampshire, and the other was State Farm Insurance Company, headquartered in Illinois.

[2] The company was created to bring Russian dancers and performers to the United States to perform and teach dancing.

time, Verbitskaya became aware of Khazanov's paintings and the insurance money he received from the settlement. After the relationship ended, Verbitskaya began calling Khazanov frequently to ask him for money. During one two-week period, Khazanov received eighteen messages from her on his answering machine. Verbitskaya threatened to tell the authorities that Khazanov had raped her if he did not give her money.

In August of 2001, Verbitskaya called Khazanov and attempted to make amends for her past behavior. She stated that she had started a new life and would like to be friends. Verbitskaya visited Khazanov and his new girlfriend, Olga Petrounina, on August 18, 2001. At Khazanov's residence, Verbitskaya admired several paintings and a grand piano. She proposed that she help Khazanov sell the paintings, and they scheduled a meeting at her condominium.

On August 22, 2001, Khazanov and Petrounina brought five paintings to Verbitskaya's residence, where Verbitskaya introduced Verbitsky as a potential buyer. Petrounina went with Verbitskaya to take her dog for a walk and to get the paintings from her car. After Verbitskaya and Petrounina left, Verbitsky assaulted Khazanov with a golf club, stabbed him in the arms with a knife, and threatened him while holding a gun. Verbitskaya and Petrounina then returned to the condominium. Petrounina observed the bruises on Khazanov and the golf club in Verbitsky's hand. She was immediately told to leave the apartment. While Petrounina waited for Khazanov in the lobby, Verbitskaya joined Verbitsky in beating Khazanov with the golf club.

Verbitsky and Verbitskaya forced Khazanov to sign receipts indicating that the paintings had been sold to them for $ 2,630 and that the piano had been sold to them for $ 15,000. They ordered Khazanov to have the items delivered to them on August 23, 2001. Verbitsky also ordered Khazanov to transfer $ 260,000 to a Swiss

bank account.[3] To ensure his compliance, Verbitsky threatened to kill Khazanov's parents and to have his daughter raped by the Russian mafia if he did not abide by Verbitsky's demands. They also forced Khazanov to record on an audiotape that he had raped Verbitskaya. Verbitskaya's voice could be heard in the background of the tape telling Khazanov what to say.

Following Khazanov's release from Verbitskaya's residence, he and Petrounina reported to the police the theft of the artwork and the extortion of his insurance settlement money. Khazanov and Petrounina returned to Verbitskaya's condominium building, accompanied by detectives, and identified Verbitskaya in the lobby. Detectives then proceeded to Verbitskaya's condominium, identified themselves as law enforcement officers, and waited for Verbitsky to open the door. Verbitsky thought the police were members of the Russian mafia and shouted that he was' "one of them." When Verbitsky admitted the detectives into the residence, they found several pieces of artwork in plain view. Verbitsky and Verbitskaya were arrested and later indicted by a federal grand jury for violations of the *Hobbs Act*.[4]

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[3] Verbitsky gave Khazanov a slip of paper with the Swiss bank account number on it.

[4] The defense made an oral motion to dismiss the indictment based upon perjury by Khazanov during the grand jury proceedings. Before the grand jury, Khazanov denied having had a relationship with Verbitskaya. The court denied the motion. Khazanov later admitted at trial that the two were involved romantically six months after his wife passed away.

Before the case proceeded to trial, the district court held a charge conference on the government's proposed jury instructions.[5] Both defendants objected to the government's definition of the interstate commerce requirement. The court overruled all objections and adopted the government's proposed instructions. At the close of the government's case, the defendants moved for judgments of acquittal, arguing that the government had "failed to provide sufficient evidence to establish jurisdiction of this Court to hear these particular charges . . . ." The court dismissed the motion. After the defendants completed their defense, they renewed their motions for acquittal, which the court again denied. Following the completion of a seven day trial, the jury convicted Verbitsky and Verbitskaya on both counts. The judge sentenced Verbitsky to 120 months in prison and Verbitskaya to 108 months in prison.[6]

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[5] The instructions read as follows: "You are instructed that you may find the required effect upon interstate commerce has been proved if you find beyond a reasonable doubt that: (1) the paintings were taken from Stanislav Khazanov and those paintings were sent from Russia to be sold in the United States; or (2) money was demanded by the defendants from Stanislav Khazanov, and this money was to be transferred from a bank account in the United States to a bank account in the country of Switzerland; or (3) that the funds to be taken [from] Stanislav Khazanov came from insurance companies outside the state of Florida and were placed in an account in the state of Florida; or (4) Stanislav Khazanov's Bank of America account was used to do business outside the State of Florida."

[6] At sentencing, Verbitsky contended that no firearm was used in the commission of the offense and that he did not own a firearm. The judge rejected this contention and sentenced Verbitsky under *Section 2B3.3 of the Federal Sentencing Guidelines* for "otherwise

(continued...)

II.

A.

On appeal, Verbitskaya makes three arguments. Her first argument is that the district court erred when it instructed the jury that only a "minimal" effect and not a "substantial" effect on interstate commerce was necessary to prove a violation of the Hobbs Act, *18 U.S.C. § 1951(a)*. Our review of a trial court's jury instructions is limited. If the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instruction. *United States v. Fulford, 267 F.3d 1241, 1245 (11th Cir. 2001)*. Under this standard, "we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Id.* (citing *Carter v. Decision One Corp., 122 F.3d 997, 1005 (11th Cir. 1997)*. "We will reverse the district court because of an erroneous instruction only if we are left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* (internal quotations omitted).

The Hobbs Act provides that "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both." *18 U.S.C. § 1951(a)*. The Act defines commerce as being "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." *Id. § 1951(b)(3)*.

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[6](...continued)
using" a firearm during the commission of the offense.

This Circuit long has held that the jurisdictional requirement under the *Hobbs Act* can be met simply by showing that the offense had a "minimal" effect on commerce. *United States v. Jackson, 748 F.2d 1535, 1537 (11th Cir. 1984); see also United States v. Summers, 598 F.2d 450, 454 (5th Cir. 1979).*[7] Verbitskaya argues that *United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)* altered this long-standing position and, that therefore, the district court erred.[8] Specifically, Verbitskaya contends that *Lopez* expressly required the "substantial" effects test to apply to Congressional legislation involving criminal statutes in areas traditionally left to the states. Verbitskaya further contends that *United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)* also requires this Circuit to apply the substantial effects test for *Hobbs Act* violations.

Our precedent is clear, however, that "even after *Lopez* a conviction [under the] *Hobbs Act* . . . requires proof of a minimal, not substantial, effect on commerce" and that "*Morrison* does not alter our *Hobbs Act* precedent." *United States v. Gray, 260 F.3d 1267, 1274 (11th Cir. 2001).* The Gray court reasoned that unlike the *Guns Free School Act* at issue in *Lopez* and the *Violence Against Women*

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[7] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)*, adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[8] In *Lopez*, the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power." *Lopez, 514 U.S. at 558.* First, Congress may regulate the "use" of the channels of interstate commerce. *Id.* Second, Congress may regulate "the instrumentalities" of interstate commerce. *Id.* Third, Congress may regulate those activities which "substantially affect" interstate commerce. *Id. at 558-59.* Verbitskaya argues that the *Hobbs Act* falls under the third category.

Act at issue in *Morrison*, "the *Hobbs Act* contains an explicit jurisdictional element confirming that the Act was indeed passed pursuant to Congress's power to regulate interstate commerce." *Id.*; *see also United States v. Castleberry, 116 F.3d 1384, 1387 (11th Cir. 1997)*. Though Verbitskaya urges us to change this long-standing position, we decline to do so.

Verbitskaya next argues that three of the government's four theories of how the extortion affected interstate commerce were legally insufficient and that, therefore she is entitled to a new trial because the jury only returned a general verdict. Under *Griffin v. United States, 502 U.S. 46, 58-59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*, a general verdict cannot be sustained if any of the possible bases of conviction were legally erroneous. *See also, Zant v. Stephens, 462 U.S. 862, 881, 103 S. Ct. 2733, 2745, 77 L. Ed. 2d 235 (1983)* ("if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is [legally] insufficient, because the verdict may have rested exclusively on the insufficient ground" reversal is required).

The district court instructed the jury that it could find the required effect upon interstate commerce based on any one of the government's following four theories: (1) that defendants' extortion of Khazanov's paintings, which were sent from Russia, prevented Khazanov from selling the paintings in his art gallery; (2) money the defendants demanded from Khazanov was to be transferred from a United States bank account to a Swiss bank account; (3) the money Khazanov would have used to pay the extortionate demands was derived from the settlement in his wife's wrongful death lawsuit which came from an out-of-state insurance company; or (4) the money Khazanov would have used to pay the extortionate demands was being maintained by Khazanov in a bank account that Khazanov used to engage in interstate business.

Verbitskaya contends that theories one, three and four were not properly submitted to the jury.[9] Specifically, Verbitskaya contends that these three theories do not fit the test formulated in *United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994)*, which she claims this Circuit adopted in *United States v. Diaz, 248 F.3d 1065, 1084-85 (11th Cir. 2001)*. Under this test, extortion directed toward an *individual* violates the *Hobbs Act* only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) the acts cause or create the likelihood that the individual will deplete the assets of an entity in interstate commerce; or (3) the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce. *Id.* Though we use this test as a guideline, we note that this Circuit has not expressly adopted the Fifth Circuit's test.[10]

Under the first theory, i.e. the obstruction of Khazanov's ability to sell his paintings in interstate commerce, Verbitskaya argues that the paintings were not owned by an entity engaged in interstate

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[9] Verbitskaya concedes that theory two was properly presented at trial. *See United States v. Kaplan, 171 F.3d 1351, 1355 (11th Cir. 1999)* (en banc) (upholding a defendant's conviction for conspiracy to violate the *Hobbs Act* based on evidence that the conspiracy required at least one transaction between Florida and Panama).

[10] Despite the fact that the *Diaz* court used this test, we have continued to stress a fact-specific inquiry into the directness and likely extent of any impact on interstate commerce. *248 F.3d at 1084-85*. Only eight months after *Diaz* was published, this Court decided *United States v. Carcione, 272 F.3d 1297, 1301 n.6 (11th Cir. 2001)*, which reiterated our long-standing precedent that "in determining whether there is a minimal effect on commerce, each case must be decided on its own facts," thereby rejecting "restrictive" reliance on the *Collins* test.

commerce nor was Khazanov an individual who was "directly and customarily engaged in interstate commerce." Specifically, Verbitskaya contends that the paintings were Khazanov's personal property and were hung in his personal residence.

Upon review of the record, we conclude that there was ample evidence for the jury to find that the theft of the paintings interfered with their potential sale into interstate commerce. Khazanov already had incorporated a business and planned to build an art gallery in order to sell his paintings. Verbitskaya twice offered to help Khazanov sell his paintings and that was indeed his intention on the day of the extortion. Thus, under the first prong of the *Collins* test, Khazanov was directly engaged in interstate commerce, and the loss of the paintings directly depleted his assets.

Under the third theory, the district court permitted the jury to find an effect on interstate commerce if it found that the money extorted by the appellants was transferred to Khazanov from out-of-state insurance companies. Verbitskaya argues that this theory was insufficient because once Khazanov deposited his money into a personal bank account, the funds lost any previous interstate character. Extortion of money obtained in interstate commerce affects interstate commerce. *See United States v. Fabian, 312 F.3d 550, 556 (2d Cir. 2002)* (holding that a "robbery that specifically targets a large, discreet sum of money derived from interstate commerce affects interstate commerce '); *see also United States v. Mills, 204 F.3d 669, 672 (6th Cir. 2000)* (in an extortion case, the requisite effect on interstate commerce is met where a "realistic probability that bribe money would be borrowed from a company engaged in interstate commerce ' was shown and the defendant had "actual knowledge of the interstate character of the funds"). Here, Verbitskaya had actual knowledge that Khazanov had received a large discreet sum of money from out-of-state insurance companies. In fact, the amount he was told to wire to the Swiss account was the same amount she had learned he retained from the settlement. Thus, the third theory was legally sufficient.

Under the final theory, Verbitskaya argues that the fact that Khazanov kept his money in a bank with interstate ties does not mean that the attempted extortion affected interstate commerce. Verbitskaya's argument is misplaced. The district court did not charge that the government could prove an effect on interstate commerce simply by proving that the bank had ties to interstate commerce; rather, the court instructed that the jury could convict if Khazanov's own bank account was "used to do business outside the state of Florida." *See United States v. Bengali, 11 F.3d 1207, 1212 (4th Cir. 1993)* (concluding that an extortion scheme affected intestate commerce when "money . . . used to pay . . . extortioners came from a bank account used by a business engaged in interstate and foreign commerce"). Khazanov used his bank account to start his business which involved payments to contacts outside Florida. Thus, he was directly engaged in out-of-state business and the fourth theory was legally sufficient.

We conclude that all four theories were legally sufficient. Under *Griffin*, a general verdict given by a trial court can be sustained if none of the possible theories submitted to the jury were legally erroneous. *502 U.S. at 58-59.* Therefore, the district court's instructions did not violate the *commerce clause.*

Finally, Verbitskaya argues that the district court committed plain error by failing to require a unanimous verdict on the government's four alternative theories on how interstate commerce was affected by the extortion in this case. The district court did not require the jury to agree unanimously on which theory or theories it was relying for its verdict. Though Verbitskaya did not request a special unanimity instruction, Verbitskaya claims that the district court's failure to issue the instruction *sue sponte* deprived her of her *Sixth Amendment* right to a unanimous jury and was plain error under *Fed.R.Crim.P. 52(b).* In support of this contention, she cites to *United States v. Gipson, 553 F.2d 453, 458 (5th Cir. 1977)*, which held that where entirely different alternative conceptual groupings and facts are alleged to support a single crime, the *Sixth Amendment* requires unanimity regarding the specific theory relied upon by the jury to reach its

verdict and the district court must instruct the jury that it must unanimously agree on which theory and which specific factual actus reus supports the verdict.

Gipson was discredited by the Supreme Court's 1991 decision in *Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).*[11] In *Schad*, the Supreme Court noted: "we are not persuaded that the *Gipson* approach really answers the question, however. Although the classification of alternatives into 'distinct conceptual groupings' is a way to express a judgment about the limits of permissible alternatives, the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions." *501 U.S. at 635; see also United States v. Sanderson, 966 F.2d 184, 187 (6th Cir. 1992)* (stating that *Schad* rejected the *Gipson* analysis).[12] Therefore, we do not follow the *Gipson* approach in this

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[11] In *Schad*, the Supreme Court held that a conviction under instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony-murder did not deny due process. *501 U.S. at 644-45.*

[12] Verbitskaya claims that the Supreme Court did not completely overrule *Gipson* by arguing that two Eleventh Circuit decisions make clear that *Gipson* is still valid and binding. Verbitskaya cites to *United States v. Bobo, 344 F.3d 1076 (11th Cir. 2003)* and *United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998).* In *Bobo*, the court relied upon *Gipson* in reversing a conviction for the district court's failure to require the "jury to unanimously agree on which overt act" constituted the alleged criminal scheme. *344 F.3d at 1085.* In *Adkinson*, this court relied upon *Gipson* to find that the district court committed plain error in failing to *sua sponte* instruct the jury that they must unanimously agree on which scheme constituted bank fraud. *135 F.3d at 1377-78.* Both of these cases, however, concerned

(continued...)

case and we conclude that the district court did not need to instruct the jury to unanimously agree on which theory supported the verdict.

B.

We now turn to Verbitsky's seven arguments made on appeal. First, he argues that there was insufficient evidence presented to support the jury's verdict. Whether sufficient evidence was presented at trial to support Verbitsky's *Hobbs Act* convictions is a question of law subject to *de novo* review. *United States v. Keller, 916 F.2d 628, 632 (11th Cir. 1990).* We review the sufficiency of the evidence to determine whether a reasonable jury could have concluded that the evidence established Verbitsky's guilt beyond a reasonable doubt. The evidence is viewed in the light most favorable to the government and all reasonable inferences and credibility choices are made in the government's favor. *United States v. Carcione, 272 F.3d 1297, 1300 (11th Cir. 2001); United States v. Johnson, 713 F.2d 654, 661 (11th Cir. 1983).*

Verbitsky first argues that there was insufficient evidence to prove that he was involved in a conspiracy with his former wife to plot and to conspire to extort from Khazanov his valuable possessions and a large sum of money. "To prove a *Hobbs Act* conspiracy under *18 U.S.C. § 1951*, the government must prove that (1) two or more persons agreed to commit a robbery or extortion encompassed within the *Hobbs Act*; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in helping to accomplish the goal." *United States v. Pringle, 350 F.3d 1172, 1176 (11th Cir. 2003).* A *Hobbs Act* conspiracy can be proved by showing a *potential impact* on interstate commerce. *See United States v. Farrell, 877 F.2d 870, 875 (11th Cir. 1989)* (conspiracy established by proof of a

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[12](...continued)
claims by the defendants that the language of the charging count in the *indictment* was insufficient. The issue of whether the indictment was sufficient was not present in this case.

potential impact on interstate commerce in an extortion-kidnapping plot).

Khazanov and Petrounina's testimony at trial established that Verbitsky was involved in a conspiracy with Verbitskaya to commit extortion. The testimony showed that Verbitsky and Verbitskaya planned to extort money from Khazanov by luring him to Verbitskaya's condominium with his paintings and then forcing him to sign faulty receipts and to agree to wire money to Verbitsky's Swiss bank account. In order to accomplish this, Verbitsky stabbed Khazanov with a knife, hit him in the spine with a golf club and threatened to have his mother and daughter raped. Verbitskaya knew of the settlement award that Khazanov had received from his wife's death, and Verbitsky took advantage of this information in order to extort the money from Khazanov. Thus, all three elements of conspiracy were met here.

Verbitsky also challenges his conviction for extortion under the *Hobbs Act*. He avers that the evidence presented at trial did not support the jury's verdict. In contrast to Verbitskaya's claim, Verbitsky concedes that under Eleventh Circuit precedent, in order to prove a *Hobbs Act* violation where extortion occurs, the government only needs to prove that the extortion had a "minimal effect" on interstate commerce. *United States v. Woodruff, 296 F.3d 1041, 1049 (11th Cir. 2002)*. Nevertheless, Verbitsky claims that the government did not meet even this minimal burden. For support, he cites to *United States v. Frost, 77 F.3d 1319, 1320 (11th Cir. 1996) (modified on other grounds, 139 F.3d 856 (11th Cir. 1998))* in which the court held that extortion of a city council member, even though the city council itself affected commerce, would not have a minimal effect on interstate commerce.

The *Frost* case is distinguishable from the case *sub judice*. In *Frost*, there was no evidence "that the resignation of one member of a six-member city council would have impacted the continuing business of that governing body." *Id. at 1320*. In contrast, here Verbitsky's extortion of Khazanov directly affected Khazanov's

ability to sell his paintings through interstate commerce and use his money for his Russian dance business. *See* discussion *infra* Part A. Thus, the government submitted sufficient evidence to prove a minimal effect on interstate commerce.

Second, Verbitsky argues that the indictment should have been dismissed due to presentation of false testimony to the grand jury and that therefore, his convictions must be vacated. We reverse a grand jury indictment when the error "substantially influenced the grand jury's decision to indict, or [when] there is grave doubt that the decision to indict was free from such substantial influence of such violations." *United States v. Vallejo, 297 F.3d 1154, 1165 (11th Cir. 2002).*[13]

Verbitsky contends that Khazanov's testimony that he had never had a sexual relationship with Verbitskaya substantially influenced the grand jury's decision to indict Verbitsky and Verbitskaya. We conclude that Khazanov's false testimony concerned a collateral matter, not the facts of the defendant's extortion.[14] Therefore, there was not a substantial likelihood that the grand jury was unduly influenced by Khazanov's testimony.

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[13] Additionally, false testimony before the grand jury justifies dismissal of an indictment if the false testimony results from "prosecutorial misconduct" that causes prejudice to the defendant. *Bank of Nova Scotia v. United States, 487 U.S. 250, 251, 108 S. Ct. 2369, 2371, 101 L. Ed. 2d 228 (1998).* When Khazanov testified in front of the grand jury the prosecution did not know that this testimony was false. As soon as the government became aware of the false testimony, the perjury was brought to the attention of the court.

[14] Moreover, Khazanov admitted at trial that he had lied about his relationship with Verbitskaya and was cross-examined extensively on the subject.

Verbitsky's third argument is that the prosecution engaged in misconduct during trial. During opening arguments at trial, the prosecutor revealed to the jury that Verbitsky had told the police when they came to arrest him that he was "one of them" and "part of the Russian mob." Verbitsky claims that this was a misstatement of what would be said later at trial.

The defense did not contemporaneously object to this statement at trial. Thus, we review the propriety of the government's statement for plain error. *United States v. Newton, 44 F.3d 913, 920 (11th Cir. 1995).* An error is plain only if it is clear and obvious and affects a defendant's substantial rights. *Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549, 137 L. Ed. 2d. 718 (1997).*

A government witness did later testify that Verbitsky made the statement "I am one of you," referring to the mob, when the police knocked on his door. Therefore, we conclude that the prosecutor's statement does not rise to the level of plain error.

Verbitsky also claims that the prosecutor vouched for his witness during opening arguments when he told the jury that Khazanov had lied at the indictment but would tell them the truth at trial. The prosecutor said in his opening statement that Khazanov would now tell the jury the truth about his previous relationship with Verbitskaya. After the defense objected to this assertion, the court explained to the jury that "a lawyer cannot vouch for his witness at this point." Then the prosecutor rephrased his statement and told the jury that Khazanov would admit to having an affair with Verbitskaya.

In reviewing this claim of prosecutorial misconduct, which was preserved for appeal, we assess (1) whether the challenged comments were improper and (2) if so, whether they prejudicially affected the substantial rights of the defendant. *United States v. Castro, 89 F.3d 1443, 1450 (11th Cir. 1996).* The prosecutor's comments were not based on personal opinion but upon the evidence he expected to, and

did in fact, present at trial. Thus, we conclude that the comments did not prejudicially affect Verbitsky's substantial rights.

Verbitsky further contends that the prosecutor's comments during closing arguments rise to the level of plain error. Verbitsky points to comments the prosecutor made again about Verbitsky's connections with the Russian mafia, comments about how Khazanov was forced to record a statement declaring that he raped Verbitskaya, and references to Verbitsky's failure to testify.[15] Verbitsky did not object to these comments at trial, and therefore we review them for plain error. *Newton, 44 F.3d at 920.*

Upon review of the record, we conclude that (1) the references to Khazanov's recorded statement merely commented on the evidence presented to the jury; (2) the references to the Russian mob were not in error because a government witness testified that Verbitsky had yelled to the police that he was "one of them" referring to the Russian mob; and (3) it was not plain error for the prosecutor to point out that the defense did not give an innocent explanation in light of the evidence of his guilt. *See United States v. Delgado, 56 F.3d 1357, 1368 (11th Cir. 1995)* ("a defendant's *fifth amendment* privilege is not infringed by a comment on the failure of the defense, *as opposed to the defendant*, to counter or explain the testimony presented or evidence introduced").

Fourth, Verbitsky claims that the district judge's interruptions of the defense created an air of partiality which denied him the right to a fair and impartial trial. We review a district judge's conduct during trial for abuse of discretion. *See United States v. Cox, 664 F.2d 257, 259 (11th Cir. 1981).* "In order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *United States v.*

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[15] The prosecutor specifically said, "Can the defense explain these things? We have."

Ramirez-Chilel, 289 F.3d 744, 750 n.6 (11th Cir. 2002). Upon review of the record, we conclude that the interruptions by the court did not show bias and were within the court's discretion. We further conclude that they were necessary to help to maintain the pace of the trial. Finally, we note that the court instructed the jury that comments of the court did not reflect the court's opinion concerning any of the issues in the case. Thus, Verbitsky was not denied the right to an impartial trial.

Fifth, Verbitsky argues that his counsel was ineffective. Except in the rare instance when the record is sufficiently developed, we will not address claims for ineffective assistance of counsel on direct appeal. *United States v. Tyndale, 209 F.3d 1292, 1294 (11th Cir. 2000).* In this case, the record is sufficiently developed to permit us to reject Verbitsky's claim.

In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the United States Supreme Court established the following two-part test to show ineffective assistance of counsel that violates the *Sixth Amendment*: (1) "the defendant must show that counsel's performance was deficient," defined as "representation [that] fell below an objective standard of reasonableness;" and (2) "the defendant must show that the deficient performance prejudiced the defense" by demonstrating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See also Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003).*

Verbitsky contends that he was denied effective counsel when his "lead counsel" was absent the day of the closing argument. At trial, Verbitsky was represented by Albert Dayan and Reemberto Diaz. Dayan gave the opening argument in the case and was planning to give the closing argument. Diaz argued many of the motions and performed the majority of the cross-examination. Dayan was absent the day of the closing, and *upon agreement from Verbitsky*, the court allowed Diaz to present the closing argument. Moreover, early on in the trial, Dayan told the judge that Diaz was "a seasoned attorney"

and the Diaz had "much more experience" than he did. Thus, Dayan's absence during closing arguments did not fall below an objective standard of reasonableness.

Verbitsky also asserts that trial counsel was ineffective for failing to call Natalie Policolo as an "expert" in "international business type work." Verbitsky's counsel proffered that she would testify about "how in international transactions people give each other the bank account numbers, how it is one of the most relevant things in any negotiation." The district court ruled that based on that proffer Ms. Policolo could not testify at trial but that the defense could seek reconsideration based on a further proffer. Verbitsky claims that he received ineffective counsel when no further proffer was made by his attorneys. He does not establish, however, what further proffer could have been made, nor does he establish how, but for this omission, the result of the proceedings would have been different. Thus, we conclude that Verbitsky's *Sixth Amendment* right to counsel was not violated.

Sixth, Verbitsky argues that the district court improperly instructed the jury regarding the possible means by which the extortion may have affected interstate commerce. As we discussed at length earlier, the judge properly instructed the jury. *See* discussion *infra* Part A.

Verbitsky's final argument is that the district court erred in imposing an enhancement for use of a firearm, pursuant to *section 2B3.2(b)(3) of the United States Sentencing Guidelines* ("U.S.S.G."). Verbitsky notes that officers did not find a firearm at Verbitskaya's condominium and that Khazanov did not indicate that a handgun was used in the commission of the offense when he first reported the incident to officials. Verbitsky also argues that, even if the existence of the weapon was proven, there was insufficient evidence to support a six-level enhancement, because the firearm was not "otherwise used" during the incident. He claims that there was no direct testimony or evidence that the weapon was pointed at Khazanov.

Section 2B3.2 calls for an increase of seven offense levels if a firearm was discharged during the course of extortion by force or threat, an increase of six levels if a firearm was "otherwise used," and an increase of five levels if a firearm was "brandished or possessed." *U.S.S.G. § 2B3.2(b)(3)(A)* (2002). A firearm was brandished if "all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person . . . ." *U.S.S.G. § 1B1.1.*, comment. (n.1(c)) (2002). A firearm was "'otherwise used' . . . if the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm . . ." *U.S.S.G. § 1B1.1*, comment. (n.1(f)) (2002).

We addressed the difference between merely brandishing and otherwise using a firearm in *United States v. Cover, 199 F.3d 1270, 1278 (11th Cir. 2000)*, holding that "the use of a firearm to make an explicit or implicit threat against a specific person constitutes 'otherwise use' of the firearm." Here, Khazanov's testimony at trial established that Verbitsky beat him with a golf club, punched him with a knife, and threatened to have his daughter raped. Khazanov further testified that Verbitsky then grabbed a handgun from behind his back and told Khazanov that, if Khazanov did not follow through with sending the demanded money to Switzerland, Verbitsky and Verbitskaya would shoot him. Furthermore, Officer Marcy Stone, of the Miami-Dade Police Department, testified that, on the night when Khazanov reported the incident to the authorities, she heard "the rack of a gun" as she waited for assistance from other officers outside of Verbitskaya's condominium. We conclude that the district court was within its discretion to find that Verbitsky used the firearm to make an explicit threat.

Finally, we note that subsequent to filing his initial brief on appeal, Verbitsky submitted supplemental authority raising the Supreme Court's decision in *Blakely v. Washington, 542 U.S. 296, 124 S. Ct.*

2531, 159 L. Ed. 2d 403 (2004).[16] In this submission, Verbitsky claimed that the *Blakely* decision "impacts his case in that it applies to [his firearm enhancement claim] and any other enhancements that were given at sentencing." We granted the government's motion to strike this supplemental authority from the record. Following oral argument in this case, the Supreme Court decided *United States v. Booker, 543 U.S. __, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005),*[17] which Verbitsky soonafter submitted to us as supplemental authority. In *United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000)* we stated:

> Parties must submit all issues on appeal in their initial brief . . . When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on "*intervening* decisions or *new* developments" regarding issues already properly raised in the initial briefs . . . Also, parties can seek permission of the court to file supplemental briefs on this new authority . . . But parties cannot properly raise new issues at supplemental briefing, even if the issues arise

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[16] In *Blakely*, the Supreme Court applied the rule set out in *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and held that because the facts supporting the trial court's imposition of a greater sentence were neither admitted by the petitioner nor found by a jury, the sentence imposed above the range indicated in the *State of Washington's Sentencing Reform Act* violated Blakely's *Sixth Amendment* right to a fair trial.

[17] In *Booker*, the Supreme Court held that the *Sixth Amendment* right to trial by jury is contravened when the sentencing court, acting under the mandatory Guidelines, imposes a sentence greater than the maximum sentence authorized by the facts that were found by the jury alone. *125 S. Ct. at 749-56.*

> based on the intervening decisions or new developments cited in the supplemental authority.

(internal citations omitted) (emphasis in original). We reiterated this principle in *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004), when we said that we would not entertain Levy's *Blakely* claim raised in his petition for rehearing "because Levy did not timely raise it in his initial brief on appeal." Similarly, in *United States v. Shelton*, 400 F.3d 1325, 1330 n.5 (11th Cir. 2005), we reviewed petitioner Shelton's *Blakely/Booker* claim on appeal because he timely raised the issue in his initial brief. We noted in a footnote, however, that Shelton's case was distinguishable from the case of petitioners who "default[], waive[], or abandon[] at the appellate stage the *Apprendi*, *Blakely*, or *Booker* issues." *See also United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (stating that "we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned."). Thus, we decline to address this issue because it is a completely new issue which Verbitsky is seeking to raise for the first time in a supplemental filing.

III.

Upon review of the record, and upon consideration of the briefs of the parties, we find no reversible error. Accordingly, we **AFFIRM** the decision of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11870-II

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

VIKA VERBITSKAYA,
a.k.a. Victoria Verbitsky,
a.k.a. Vika Rounick,
a.k.a. Victoria Pakuk, and
ALEXANDER VERBITSKY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

Before: BIRCH, KRAVITCH and CUDAHY*, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5,

the Petition(s) for Rehearing En Banc are Denied.

ENTERED FOR THE COURT:

_____

PHYLLIS KRAVITCH 8/8/05
UNITED STATES CIRCUIT JUDGE

*Honorable Ricahrd D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	*	
Appellee,	*	CASE NO. 03-11870
v.	*	
ALEXANDER VERBITSKY,	*	
Appellant.	*	

MOTION TO ALLOW SUPPLEMENTAL
BRIEFING ON BLAKELY ISSUE

COMES NOW, Counsel for the Appellant herein, Alexander Verbitsky, and requests that this Court, in light of the striking of the Supplemental Authority pursuant to 28(J) filed by the Appellant, allow the Appellant to file a Brief based upon the decision in *Blakely v. Washington*, 125 S.Ct. 2531 (2004). Appellant's counsel submits that the *Blakely* decision has direct effect on Appellant's case.

WHEREFORE, Counsel respectfully requests that this Court grant Appellant's request to file a supplemental brief int his case based upon *Blakely*.

Respectfully submitted,

Kevin M. Schad
Attorney for Appellant
SCHAD & COOK
8240 Beckett Park Drive
Indian Springs, OH 45011
513-870-4980; Fax 513-870-4984
E-Mail: kevinschad@yourattorney's.net

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been mailed this 24th day of September, 2004, through regular United States Mail with sufficient postage affixed to ensure delivery, addressed to:

Anne R. Schultz
Office of the U.S. Attorney
99 NE Fourth Street, Ste 512
Miami, Florida 33132

G. Richard Strafer, Esq.
2400 S. Dixie Highway, Ste 200
Miami, FL 33133
Counsel for Vika Verbitskaya

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11870-II

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

VIKA VERBITSKAYA,
a.k.a. Victoria Verbitsky,
a.k.a. Vika Rounick,
a.k.a. Victoria Pakuk, and
ALEXANDER VERBITSKY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellee's motion to strike the Fed.R.App.P. 28(j) supplemental authority filed by Appellant, which references the Supreme Court's decision in *Blakely v. Washington*, _U.S._, 125 S.Ct. 2531 (2004, is GRANTED. *See U.S. v. Blasco*, 702 F.2d 1315, 1332 n. 28 (11th Cir. 1983).

STANLEY MARCUS 9/7/04
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11870-II

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

VIKA VERBITSKAYA,
a.k.a. Victoria Verbitsky,
a.k.a. Vika Rounick,
a.k.a. Victoria Pakuk, and
ALEXANDER VERBITSKY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's Motion to file supplemental briefing in light of *Blakely v. Washington*, 125 S.Ct. 2531 (2004), is hereby DENIED. See *United States v. Hembree*, 2004 WL 1873773 (11th Cir. Aug. 23, 2004); *United States v. Curtis*, 2004 WL 1774785 (11th Cir. Aug. 10, 2004); *United States v. Levy*, 2004 WL 1725406 (11th Cir. Aug. 3, 2004).

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-0869-CR-KING
18 USC 1951

UNITED STATES OF AMERICA

vs. Magistrate Judge O'Sullivan

ALEXANDER VERBITSKY
and
VIKA VERBITSKAYA,
a/k/a Victoria Verbitsky,
a/k/a Vike Rounick,
a/k/a Victoria Pakuk
_____/

INDICTMENT

The Grand Jury charges that:

INTRODUCTION

1. At all times material to this indict, Stanislav Khazaov was a Russian immigrant residing in the Southern District of Florida seeking permanent resident alien status in the United States and the opportunity to do business in the United States.

2. On November 15, 1999, the wife of Stanislav Khazanov was killed in an automobile accident and Stanislav Khazanov received an insurance settlement from four (4) out of state insurance companies, that is, State Farm Mutual Automobile Insurance Company of Bloomington, Illinois; New Hampshire Insurance Company of New York, New York; J.C. Penney Insurance

Company of Plano, Texas and Progress Insurance Company of Mayfield Village, Ohio.

3. At all times material to this indictment, Stanislav Khazanov maintained proceeds from the insurance settlement from his Wife's death in accounts at Bank of America.

4. On June 27, 2000, Stanislav Khazanov incorporated in Florida, Glamour International Productions Corp., a company established for the purpose of bringing dancers and performers from Russia to the United States for the purpose of touring the United States and performing in various cities around the United States and Teaching dancing in the United States. This corporation was financed fromKhazanov's accounts at Bank of America as set forth in paragraph number 3 above.

5. At all times material to this indictment Stanislav Khazanov possessed five paintings brought from Russia to the United States by his mother, for the purpose of opening an Art Gallery to sell Russian art in the United States.

6. On or about August 22, 2001, defendant ALEXANDER VERBITSKY demanded that Stanislav Khazanov transfer money in international commerce to Financiera Alianza S.A., Office No. 2, Commercial Center Square, P.O. Box 71, ALOFI, NIUE, Credit Commercial De France (Suisse) S.A. 280727, 1 Place Longemalle, CH-1211, Geneve 3.

COUNT 1

1. The allegations in the introduction section of this indictment are re-alleged in this count and are made part of this count

2. From on or about August 18, 2001, to on or about August 22, 2001, in Miami-Dade County, in the Southern District of Florida and elsewhere the defendants,

ALEXANDER VERBITSKY
and
VIKA VERBITSKAYA,
a/k/a Victoria Verbitsky,
a/k/a Vike Rounick,
a/k/a Victoria Pakuk

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury, to obstruct, delay and affect interstate and foreign commerce as the term "commerce" is defined in Title 18, United States Code, Section 1951(b)(3), by "extortion", as that term is defined in Title 18, United States Code, Section 1951(b)(2) in that the defendants did agree with each other and with others known and unknown to the Grand Jury to wrongfully use actual and threatened force, violence and fear against Stanislav Khazanov, his family and friends, in order to obtain from Stanislav Khazanov money and property with his consent induced by said use and threatened use of force, violence and fear.

MANNER AND MEANS

As part of this conspiracy and in an effort to achieve the objects of this conspiracy the defendants used the following manner and means among others:

1. It was part of this conspiracy that defendant, VIKA VERBITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, would feign a friendship with Stanislav Khazanov in order to determine the amount, nature and extent of Stanislav Khazanov's finances, personal property and wealth.

2. It was further part of this conspiracy that ALXEXANDER VERBITSKY would beat and stab Stanislav Khazanov and VIKA VERTITSKAYA, a/k/a Victoria Verbitsky,

a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, would kick Stanislav Khazanov in order to force Stanislav Khazanov to sign fraudulent receipts for five Russian paintings and a Weber piano and to force Stanislav Khazanov to transfer money to Financiera Alianza S.A., Office No. 2, Commercial Center Square, P.O. Box 71, ALOFI, NIUE, Credit Commercial De France (Suisse) S.A. 280727, 1 Place Longemalle, CH-1211, Geneve 3.

3. It was further part of the conspiracy that the defendants, ARTHUR VERBITSKY and VIKA VERTITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, would threaten to harm Stanislav Khazanov's family in Russia if he did not comply with their demands.

OVERT ACTS

1. On or about August 18, 2001, the defendant, VIKA VERTITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, did go to the home of Stanislav Khazanov in Hallandale, Florida.

2. On or about August 22, 2001, the defendant, VIKA VERTITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, did invite Stanislav Khazanov and Olga Patrounina to come to 1111 Biscayne Boulevard, Building 2, PH-B, Miami, Florida.

3. On or about August 22, 2001, the defendants, ARTHUR VERBITSKY and VIKA VERTITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, did stab, beat, kick and threaten Stanislav Khazanov.

4. On or about August 22, 2001, the defendants, ARTHUR VERBITSKY and VIKA VERTITSKAYA, a/k/a Victoria Verbitsky, a/k/a Vika Rounick, a/k/a Victoria Rounick, a/k/a Victoria Pakuk, did take from Stanislav Khazanov five Russian paintings and

did force him to sign a fraudulent receipt for the paintings and a Weber piano.

5. On or about August 22, 2001, the defendant, ALEXANDER VERBISTKY did give Stanislav Khazanov an address for a bank account at Financiera Alianza S.A., Office No. 2, Commercial Center Square, P.O. Box 71, ALOFI, NIUE, Credit Commercial De France (Suisse) S.A. 280727, 1 Place Longemalle, CH-1211, Geneve 3, and did order Stanislav Khazanov to transfer $260,000 to that account.

All in violation of Title 18, United States Code, Section 1951(a).

COUNT II

1. The allegations in the introduction section of this indictment are re-alleged in this count and are made part of this count.

2. On or about August 22, 2001, in Miami-Dade County, in the Southern District of Florida and elsewhere the defendants,

ALEXANDER VERBITSKY
and
VIKA VERBITSKAYA,
a/k/a Victoria Verbitsky,
a/k/a Vike Rounick,
a/k/a Victoria Pakuk,

did knowingly attempt to obstruct, delay and affect interstate and foreign commerce as the term "commerce" is defined in Title 18, United States Code, Section 1951(b)(3), by "extortion", as that term is defined in Title 18, United States Code, Section 1951(b)(2) in that the defendants did wrongfully use actual and threatened force, violence and fear against Stanislav Khazanov, his family and friends, in order to obtain from Stanislav Khazanov money and property with

his consent induced by the said use of force, violence and fear.

All in violation of Title 18, United States Code, Sections 1951(a) and 2.

A TRUE BILL

_____

FOREPERSON

_____

GUY A. LEWIS
UNITED STATES ATTORNEY

_____

RICHARD D. GREGORIE
ASSISTANT UNITED STATES ATTORNEY